Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1718

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOO LINE RAILROAD COMPANY, CONSOLIDATED RAIL CORPORATION (Conrail), CONAGRA INCORPORATED and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Seafarers International Union of North America, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 7, 1979.

Opinions Below

The first opinion and order of the Interstate Commerce Commission ("Commission"), *Unit Train Rates on Wheat, Etc.,* is reported at 346 I.C.C. 814 (1974). That opinion and order was modified in the second opinion and order of the Commission, *Unit Train Rates on Wheat, Etc.,* and is reported at 351 I.C.C. 470 (1976). That second opinion and order was reviewed in the first opinion of the Court of Appeals, *New York* v. *United States,* reported at 568 F.2d 887 (1977) (Appendix A, pp. A 1-25), which remanded the proceeding to the Commission. The opinion of the Commission on remand, *Unit Train Rates on Wheat, Etc.,* is reported at 356 I.C.C. 82 (1978) (Appendix B, pp. A 26-44). That opinion was reviewed in the second opinion of the Court of Appeals, *New York* v. *United States,* 600 F.2d 349 (1979), Judge Timbers dissenting (Appendix C, pp. 45-57). The order of the Court of Appeals, entered on October 3, 1979 in connection with the Court's consideration of petitions for rehearing, if it constitutes an opinion, is not reported but appears at Appendix D, pp. A 58-60.

It is our understanding that the State of New York and the S & E Shipping Corporation are also filing petitions for certiorari to review the same judgment. The appendix relied upon by the union petitioner here is not annexed to this petition; it is annexed to the petition of the State of New York.

Jurisdiction

The judgment of the Court of Appeals, issued in conjunction with the second opinion of that Court, was entered on May 7, 1979. On January 31, 1980 the Court of Appeals denied petitioner's timely petition for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the Commission's decision violates the Congressionally mandated National Transportation Policy by failing to protect the inherent advantages of water transportation, thereby conflicting with an unbroken line of controlling decisions of the Supreme Court.

2. Whether, in a discriminatory rail rate case in which the Commission in fact found a discriminatory rate as to the existing rail services, the Commission may nevertheless refuse to cancel the discriminatory rail rate on the ground that a non-existent, hypothetical rail service, not in issue, would not be feasible, and whether such determination of the Commission is irrational.

3. Whether permitting a quasi-judicial agency to disregard the mandate of a Court of Appeals is "unleashing endless mischief from a precedent standpoint," as the dissenting Judge stated (A 56).

4. Whether an ordered jurisprudence can tolerate a later panel of a Court of Appeals reversing, in effect, an earlier panel in the same case, absent a supervening decision of the Supreme Court or of the Circuit en banc.

Statute Involved

The provisions of the Interstate Commerce Act, § 3(4), 49 U.S.C.A. §3(4), are set forth in Appendix G, p. A 64).

Statement of the Case

This is a case of railroad discriminating, with the sanction of the Commission, against water carriers through the device of a rail rate on an all-rail route which is lower than the rail rate on the rail leg of a competing water-rail route.

During the time of year when the Great Lakes are navigable, grain is shipped by two routes to Martins Creek, Pennsylvania, the site of the large milling facility of respondent, ConAgra. One route is lake-rail, by lake carrier from Twin Ports (Duluth, Minnesota and Superior, Wisconsin) to Buffalo and thence by rail to Martins Creek. The other route is all-rail from Twin Cities (Minneapolis and St. Paul, Minnesota) to Martins Creek. The routes are pictured in the first opinion of the Court of Appeals, 568 F.2d at 891 (A 10). The Commission has denominated the rate on the all-rail route which competes with the lake-rail route as a "summer rate."[1]

There is no factual issue as between the dissenting opinion and the majority opinion in the Court of Appeals in the

1. While the Commission determined the propriety of both summer and winter rates, petitioner attacks only the discriminatory summer rail rate on the all-rail route, it being questionable whether seamen have standing to attack the rail rate applicable when the Great Lakes are not navigable. As consumers, however, they look askance at the higher winter rate when there is no competition from lake carriers.

second case that the rate on the rail leg of the intermodal route yields twice as much, after expenses, as the rate on the longer all-rail route. This, despite the fact that grain is delivered on the all-rail route by a more efficient unit train (comprising at least 50 cars to the single consignee, ConAgra), whereas grain is delivered on the rail leg of the intermodal route in single car or five-car lots, 600 F.2d at 352-353 (A 51-2). This disparity was either (1) noted, or (2) found to be without cost justification, or (3) concluded to be discriminatory, in the first opinion of the Court of Appeals, 568 F.2d at 897, n. 20 (A 22), in the determination of the Commission here at issue, 356 I.C.C. at 92 (A 22), in the opinion of the majority in the second case in the Court of Appeals, 600 F.2d at 351, n. 3 (A 49), and in the dissent of Judge Timbers in the second case, 600 F.2d at 353-354 (A 54-6). Judge Timbers concluded with considerable asperity that, since the Commission had found the disparity in rates to be without cost justification, the rate on the all-rail route was discriminatory within the meaning of §3(4) and should be cancelled. 600 F.2d at 354-355 (A 56).

The summer rate for the all-rail route, although referred to as a "proposed" rate throughout this litigation, had become effective on June 1, 1974, 568 F.2d at 891, n. 4 (A 4), pursuant to the initial order of the Commission, 346 I.C.C. 814 (1974). As the Court of Appeals found in its first opinion, that summer rate on the all-rail route was "designed to compete with rates on the lake-rail route from Twin Ports to Buffalo by lake carrier and thence by rail to Martins Creek," 568 F.2d at 891 (A 11).

Prior to the Commission's initial determination in 1974, the proposed rates had been protested by lake carriers,

milling companies, and groups representing various Buffalo interests, 568 F.2d at 892 (A 11). After its 1974 decision, the Commission granted the State of New York leave to intervene to consolidate and represent various New York interests, 568 F.2d at 890 (A 9). Thereafter, the Commission issued a second order, 351 I.C.C. 470 (1976) which approved the rates here in question. In that determination the Commission refused to consider whether the summer rate on the all-rail route discriminated against lake carriers, on the ground that lake carriers were not "connecting lines" entitled to protection under §3(4) of the Interstate Commerce Act.

Thereupon the State of New York sought review in the Court of Appeals and S & E Shipping Corporation, a lake carrier, intervened. The Court of Appeals held that the lake carriers were indeed connecting lines and remanded the case to the Commission "for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines." 568 F.2d at 890 (A 9). The State of New York urged that there was no necessity for remand inasmuch as the evidence before the Commission plainly indicated the discriminatory nature of the rail rate which was without cost justification, 568 F.2d at 897, n. 20 (A 22). It is clear from the first decision of the Court of Appeals that it was directing the Commission to determine whether the rail rate from Twin Cities to Martins Creek discriminated against lake carriers because it was so much less than the existing rail rate from Buffalo to Martins Creek, *e.g., ibid.* The Court of Appeals certainly did not direct the Commission to make a determination as to whether discrimination should be determined by

taking into consideration a non-existent or hypothetical train service from Buffalo to Martins Creek. The Court denied rehearing and rehearing en banc in the first case.

On remand the Commission found that there was no cost justification for the lower rail rate from Twin Cities to Martins Creek. Seafarers Union was permitted by the Commission to intervene on the remand to protect the employment opportunities of American seamen whom it represented. Cf. *Curran* v. *Laird,* 420 F.2d 122, 126 (D.C. Cir. 1969).

The Commission's rationalization for concluding that the obvious disparity in the rates was not discriminatory was that the rates on the all-rail route were applicable to the more economical unit train service on that route, whereas unit train service from Buffalo to Martins Creek would be inefficient and uneconomical. It is to be noted that there was no unit train service from Buffalo to Martins Creek. The Commission allowed the lake carriers, however, to request unit train service on the rail leg of a lake-rail route from Twin Ports to Chicago by lake carrier and thence by rail to Martins Creek, 356 I.C.C. at 93, 94 (A 42-3). Of course, no lake carrier responded; such a route would have been an absurdity, as was made clear in the October 3, 1979 order of the Court of Appeals (A 59).

Petitions to review this second determination of the Commission before the Second Circuit were filed by Seafarers Union, State of New York and S & E Shipping Corporation. The majority of the panel in the second case adopted the reasoning of the Commission, namely, that unit train service from Buffalo to Martins Creek would, if instituted, be inefficient and uneconomical and that unit

train service from Chicago to Martins Creek would remedy any discrimination on a lake-rail route. In his stinging dissent, Judge Timbers pointed out that:

> "The crux of the Commission's error is that, rather than making a determination of the discrimination issue on the basis of *existing actual conditions* on the Buffalo-Martins Creek run (which was the clear import of our remand), it has come up with a decision based on a *hypothetical new unit-train service* (which is totally beyond the scope of our mandate). In short, the Commission simply has not made the determination required by our mandate." (600 F.2d at 353, emphasis in original, A 54)

Timely petitions for rehearing were filed by the three petitioners. Thereafter, on October 3, 1979 the Court of Appeals requested further briefing by petitioners before deciding on a rehearing (A 58-60). The Court admonished the petitioners that their briefs should not consider the two grounds upon which the Commission and the majority of the panel had decided the case, presaging, so petitioners thought, their certain victory in this case. In other words, the question of a 50-car unit train from Buffalo to Martins Creek and the Chicago lake-rail interchange were eliminated as the ratio decidendi of both the Commission's and the majority of the panel's decisions.

The expectations of petitioners were not fulfilled. In the denial of rehearing, the majority of the panel adhered to its holding in the second opinion, and Judge Timbers dissented for the reasons stated in his panel decision (A 62-3). The Court en banc denied the petitions for rehearing because "a poll of the judges in regular active service having been taken and there [was] no majority in favor thereof" (A 61).

Reasons for Granting the Writ

For decades the Interstate Commerce Commission, in plain defiance of the National Transportation Policy 54 Stat. 899, Title I, §1, 49 U.S.C. preceding §1, has sought to give railroads an illegal advantage over water carriers, so as to give currency to the old saw that the Commission is the Interstate Railroad Commission. For decades this Court has found it necessary to redress the Commission's obvious bias in favor of the more powerful railroad industry and against the less powerful water transportation industry. This Court is called upon again to redress the balance.

POINT I

The majority opinion of the Court of Appeals violates the Congressionally mandated national transportation policy by failing to protect the inherent advantages of water transportation and directly conflicts with controlling decisions of this Court.

The summer all-rail rate here under attack derives from the Commission's almost per se violation of the statute and is directly athwart controlling decisions of this Court. On all fours with the instant case is *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567 (1947). There the ex-barge rail rate on the intermodal barge-rail route was higher than the rail rate on the all-rail route. The Court noted that the Commission had given its approval to the all-rail rate because it was competitive with the transportation costs on the barge-rail route. The Court struck down the lower rate on the all-rail route as discriminating against the water carriers by depriving them "of the inherent ad-

vantages of water transportation guaranteed to them by Congress." (*Id.* at 580). The inherent cheapness of the barge rate would indeed produce a disparity, said the Court, but the "Act must be so administered so as to preserve, not eliminate or reduce the disparity." (*Ibid.*)

There has been no mutation in the progeny of *Mechling*: *Dixie Carriers* v. *United States,* 351 U.S. 56, 60 (1956); *Arrow Transportation Co.* v. *United States,* 176 F.Supp. 411, 416, 417 (N.D. Ala. 1959), aff'd 361 U.S. 353 (1960); *American Commercial Lines* v. *Louisville & N.R. Co.,* 392 U.S. 571, 581, 593 (1968); *James McWilliams Blue Line* v. *United States,* 100 F.Supp. 66 (S.D.N.Y. 1951), aff'd per curiam on the authority of *Mechling,* 342 U.S. 951 (1952); *Seatrain Lines* v. *United States,* 233 F.Supp. 199 (D. N.J. 1964).

In the instant case the Commission did exactly the opposite of what this Court said it should do. It determined the propriety of the all-rail rate so as to make it competitive with the transportation costs on the lake-rail route from Twin Ports to Martins Creek. It thus eliminated the inherent advantages of water transportation.

We are at a loss to understand the first sentence of the penultimate paragraph of the Court's order dated October 3, 1979 (Appendix D), which stated:

> "However, the Buffalo-Martins Creek rate is not *per se* determinative of discrimination but only as related to the total rates from grain source to Martins Creek via lake-rail or all-rail methods of transportation." (A 60, emphasis in original.)

We are uncertain whether that sentence constitutes an opinion of the Court. In any event, it is in direct contradiction of controlling authority. It should be apparent that whenever the Commission authorizes a rate structure with the purpose in mind to make rail transportation competitive with water transportation, it is sure to run afoul of *Mechling*. And that is exactly what happened here.

POINT II

The Commission's decision that an existing rate structure, which it found to be without cost justification, is not discriminatory because a hypothetical nonexistent unit train service from Buffalo to Martins Creek would be uneconomical, is plainly irrational, in defiance of the mandate of the Court of Appeals in the first case, and may not stand "without unleashing endless mischief from a precedent standpoint."

When the Commission found that there was no cost justification for the disparity of the lower all-rail rate as contrasted with the rate on the rail leg of the lake-rail route, that should have ended the case. As Judge Timbers noted, there has been no justification of "the undisputed rate discrimination which has been found, permitting Conrail to earn roughly twice as much, *after expenses,*" from the rail leg of the water-rail route as from the all-rail route (600 F.2d at 354, A 55, emphasis in original). Judge Timbers noted that the majority opinion came to the same conclusion (*id.* at 351, n. 3, A 49).

Having all but awarded judgment to the protestants, the Commission snatched away their victory by entertaining a wholly irrelevant and irrational hypothesis. It decided

that the rates which were without cost justification were not unjustly discriminatory because a hypothetical non-existent unit train service from Buffalo to Martins Creek would be uneconomical. Not only was that irrational and irrelevant, it also defied the mandate of the Court of Appeals in the first case. See *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

And the majority of the panel in the second case was without authority to overrule, in effect, the holding of the opinion in the first case by deciding that the Commission could determine discrimination not on the basis of the existing rate structure but on the basis of a hypothetical non-existent train service which was not in issue. Absent a supervening decision of the Supreme Court or of the Court of Appeals sitting en banc, a panel of a Court of Appeals is "without authority" to overrule a prior panel, *Doraiswamy* v. *Secretary of Labor*, 555 F.2d 832, 847, n. 119 (D.C. Cir. 1976), even if the later panel believes that the earlier case was "erroneously decided," *Polisnik* v. *United States*, 259 F.2d 951, 952, n. 3 (D.C. Cir. 1958). It appears, then, that if we are to have an ordered jurisprudence, there must be a reversal.

We come now to the final and baffling development in this tangled web. In calling for further briefs, after the petitions for rehearing were filed, the Court in its order of October 3, 1979, completely cut the ground from under the ratio decidendi of both the Commission and the opinion of the majority of the panel in the second case. It said:

> "No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip

> to Buffalo. Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek." (A 59)

That was a complete vindication of the position of the petitioners. In light of that order, the denial of rehearing and rehearing en banc is just incomprehensible. An ordered jurisprudence requires reversal.

Conclusion

For the foregoing reasons, this petition for certiorari should be granted.

There is no necessity for argument or further briefing. Summary reversal is required without more; even without remand to the Commission. The "proposed" rates should be canceled by this Court forthwith. In recommending such action, Judge Timbers stated:

> "This may seem like strong medicine. But strong medicine is precisely what should be prescribel to remedy the flagrant violation of §3(4) of the Interstate Commerce Act disclosed by the undisputed record. . . ." (600 F.2d at 355, A 56-7).

Respectfully submitted,

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